U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: 08\12\99
Case No.: 1999 INA 081

In the Matter of:

BURGERS OF COLUMBIA PIKE, INC., Employer,

on behalf of

ANWER SAEED, Alien.

Appearances: Mohamed Alamgir, Esq., of Washington, D. C., for the Employer and Alien
Certifying Officer: R. E. Panati, Region III.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ANWER SAEED ("Alien") by BURGERS OF COLUMBIA PIKE, INC., ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States to perform either skilled or unskilled labor

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and the written arguments of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On January 20, 1997, the Employer applied for alien labor certification on behalf of the Alien[2] to fill the position of "Management Trainee," in his Restaurant. The job was classified as "Manager, Fast Food" under DOT Occupational Code No. 185.137-010.[3] The Employer's Form ETA 750A described the Job Duties as follows:

> Perform assigned duties under direction of experienced personnel to gain knowledge and experience required to promotion to management position. Schedule employee hours, cash and inventory reconciliation, bookkeeping , fixing all electrical and other equipment around the restaurant, supervise maintenance work under a safe environment. Replace other workers when they are absent.

AF 16, box 13. (Copied verbatim without change or correction.) The Employer stated high school graduation as the educational qualification, and required two years of experience in the

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[2] A National of Pakistan, the Alien was born in 1961. He was living and working in the United States with no visa or other lawful permission at the time of application. The Alien graduated high school in his native land in 1976. His employment from March 1976 to January 1983 was not disclosed. From January 1983 to December 1984 the Alien worked as a management trainee in a restaurant in Pakistan. From January 1993 to the date of application the Alien worked as a cashier in a pizza restaurant in Virginia. AF 18, 19.

[3] 185.137-010 **MANAGER, FAST FOOD** (retail trade; wholesale tr.) Manages franchised or independent fast food or wholesale prepared food establishment: Directs, coordinates, and participates in preparation of, and cooking, wrapping or packing types of food served or prepared by establishment, collecting of monies from in-house or take-out customers, or assembling food orders for wholesale customers. Coordinates activities of workers engaged in keeping business records, collecting and paying accounts, ordering or purchasing supplies, and delivery of foodstuffs to wholesale or retail customers. Interviews, hires, and trains personnel. May contact prospective wholesale customers, such as mobile food vendors, vending machine operators, bar and tavern owners, and institutional personnel, to promote sale of prepared foods, such as doughnuts, sandwiches, and specialty food items. May establish delivery routes and schedules for supplying wholesale customers. Workers may be known according to type or name of franchised establishment or type of prepared foodstuff retailed or wholesaled. *GOE: 11.11.04 STRENGTH: L GED:R4 M4 L4 SVP: 5 DLU:81.*

Job Offered. The Other Special Requirements were, "Must be willing and available to work week-ends and holidays." The job consisted of a forty-hour week job with no provision for overtime, at a basic wage of $12.93 per hour from 3:00 P.M., to 11:00 P.M. [4] *Id*., boxes 10-12, 14.

Notice of Findings. On July 30, 1998, the Certifying Officer (CO) issued a Notice of Findings ("NOF"), which proposed to deny certification, subject to Employer's rebuttal. AF 11-13. Noting that the DOT provided that the Specific Vocational Preparation ("SVP") of 5 for a Manager, Fast Food Services was six months to one year, and that the Employer's experience requirement for the job was two years, the NOF said its hiring criteria exceeded the SVP and the norm for this occupation.[5] Moreover, continued the NOF, the Employer's evidence did not establish that its SVP conformed to the norm used by the franchisor with which it was doing business. The NOF concluded that Employer's Application was defective in that its hiring criterion of two years' experience in the Job Offered was unduly restrictive. The NOF then described the specific evidence that the Employer was told to file in rebutting these findings. AF 11-12.

Rebuttal. Employer's September 3, 1998, rebuttal consisted of a letter from its attorney and a copy of the Employer's current "Manager Schedule." AF 07-10. The Employer offered the letter by its attorney as evidence that its experience requirement arose out of the business necessity, contending that two years of experience bore "a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform, in a reasonable manner, the job duties." The attorney said the Employer's franchisor did not, in fact, maintain guidelines or other standards for the experience level required in its franchises. After describing the nature of managerial experience and skills that Employer contended were relevant to this job, its lawyer concluded, "Basically, the Manager must be completely capable of running and

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[4] The days of the week when he would work were not given.

[5] In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." The following are the various levels of specific vocational preparation that the DOT fixed at Appendix C:

Level	Preparation
1	Short demonstration only.
2	Anything beyond short demonstration up to an including 1 month.
3	Over 1 month up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

operating the business and must be able to do so without the assistance or oversight of a superior." Directing the CO to the Manager Schedule, the attorney asserted that all of Employer's managers had two or more years of experience in the position of manager or in a related position, and that it was the Employer's practice to hire managers with two years' experience in the past. AF 09.

Final Determination. The CO's Final Determination of September 23, 1998, denied alien labor certification. AF 04-06. Citing 20 CFR § 656.21(b)(2), the CO explained that the Employer failed to establish that the hiring requirements for the position either were normally required for the performance of the job in the United States or arose from business necessity. The CO recapitulated the normal requirements for the position that Employer's Form ETA 750A described and explained that, because Employer's business is fast food and the position involves managing a fast food outlet, DOT Occupation No. 185.137-010 Manager, Fast Food Services was correctly applied to the Job Offered. As the SVP defined for a Manager, Fast Food Services, in the DOT is from six months to and including one year of combined education, training, and experience, the two year requirement required by the Employer is unduly restrictive under 20 CFR § 656.21(b)(2). As the Employer had not presented evidence that the franchisor, Burger King, required the Employer to follow guidelines mandating an experience level different from the SVP stated in the DOT, the CO further noted that there was no evidence that the Employer's restrictive requirement conformed to a norm established for Burger King franchises by the franchisor. Recapitulating the rebuttal evidence Employer was directed to file, the CO pointed out that it was given the option of reducing its experience requirements to the DOT standard. In the alternative, the Employer was told that it could prove business necessity by filing (1) the directions to supply evidence regarding the Burger King minimum job requirements for franchisees, if any; (2) evidence that the job and hiring requirements that the Employer described existed before it hired the Alien; (3) position descriptions, records, resumes, and other data of former incumbents in that job, if any; and (4) other forms of proof that the position and its present requirements existed before Employer hired the Alien. As the Employer did not elect to reduce its experience requirement to meet the SVP provided in the DOT, its evidence was weighed as proof of business necessity and found to be insufficient, as the duties its required of its managers were consistent with the DOT and, although the education, experience, and training it required was longer than the prescribed SVP, the Employer offered no explanation for exceeding the DOT norm. The CO concluded that the position was correctly classified and that the Employer's job requirements were unduly restrictive, as Employer failed to establish that the hiring requirements for the job opportunity either were normally required for the performance of the job in the United States or arose from business necessity. 20 CFR § 656.21(b)(2). AF 06.

Appeal. On October 27, 1998, the Employer filed a request for administrative-judicial review of the denial of certification. The Employer's attorney argued in its appeal that it was seeking a Management Trainee to fill a managerial position in its corporation and not a fast food outlet manager.

Thus, this job position was created as a management position to make sure that there

> would be tighter control of spending and personnel assignments at the fast food store to meet the corporation's bookkeeping and other requirements. And to allow the corporate management time to search for and find an additional store location.

The Employer then denied that it was seeking to fill a Fast Food Store Manager position, as described by the CO. AF 02. The Employer then admitted that this was the first time that this position was offered at this corporation. Explaining that this discussion of the reasons it wanted a Management Trainee of this type also stated its business necessity, Employer said, .

> The goal for this job position is to expand. This franchise must expand in order to increase the profit capability. ... The job position offered in the ETA-750 required a Management Trainee as was described above. The employer has clearly presented his/her case for business necessity. The government can not run a business according to its idea of operations. Companies are free to conduct their own operations without dictatorial powers of the government.

AF 02-03.

Discussion

Issue. To establish entitlement to certification under the Act, Employer was required to sustain the burden of proof that its hiring requirements for the Job Offered were not unduly restrictive in violation of 20 CFR § 656.21b)(2).

Employer's evidence. Before discussing the issue referred in this appeal, the Panel notes that all of the evidence Employer submitted was in the form of the assertions in briefs and other communications by its attorney. The Board has consistently rejected the allegations of counsel as a basis for the employer's assertions. **Re/Max Realty Group**, 95 INA 015 (Jul. 19, 1996); **Sarah and Norman Jaffe**, 94 INA 513 (Oct. 30, 1995); **Wong's Palace Chinese Restaurant**, 94 INA 410 (Oct. 12, 1995). The exception in **Modular Container Systems, Inc.**, 89 INA 228 (July 16, 1991)(*en banc*), that an attorney may be competent to testify about matters of which he has first-hand knowledge, does not apply to counsel's statements of fact in this appeal, since the record contains no evidence of any such first hand knowledge. Consequently, in weighing the Appellate File the Panel has concluded that allegations of fact by counsel for this Employer do not constitute evidence, as they were not corroborated by documentation or supported by the statement of a person with knowledge of the facts. **Moda Linea, Inc.**, 90 INA 025 (Dec. 11, 1991). Finally, the Panel has been guided by BALCA's holding in **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*), that a factual theory presented by counsel in a brief cannot serve as evidence of material facts is relevant to counsel's statements of fact in his appellate argument.

Burden of proof. Noting that the denial of alien labor certification in this case was based on the CO's finding that the Employer failed to sustain this burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored

treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .[6]

Analysis and conclusion. While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. An employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement. The reason such unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates**, 87 INA 569 (Jan. 13, 1989)(*en banc*).
This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which disallows the use of unduly restrictive job requirements in the recruitment process.

Information Industries, 88 INA 082 (Feb. 9, 1989)(*en banc*), describes the criteria for proof of business necessity. Employer must show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the restrictive requirement is essential to performing in a reasonable manner the job duties described by the employer. The business necessity for a restrictive requirement is not established where the employer fails to provide any supporting documentation. **Coker's Pedigreed Seed Co.**, 88 INA 048(*en banc*); also see **Valley Rest Nursing Homes**, 96 INA 029 (Jun. 5, 1997); **John Hancock Financial Services**, 91 INA 131 (Jun. 14, 1992).

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[6] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Although the NOF told the Employer to file specific documentary proof that its SVP was consistent with the industry norm or was a business necessity, the Employer failed to provide documentation that was reasonably requested by CO. This alone was sufficient to warrant denial of the certification Employer's Application requested. **Remington Products, Inc.**, 89 INA 173(*en banc*). On its face the CO's Final Determination correctly found no persuasive evidence to support the Employer's argument, it presented nothing but the unsupported assertions of its lawyer as the proof of everything it had to say. Even if the lawyer's remarks were signed by the Employer and its written assertions were treated as documentation, however, Employer's rebuttal was a bare assertion without supporting reasoning or evidence, which was insufficient to sustain its burden of proof. **Gencorp**, 87 INA 659(Jan.13, 1988)(*en banc*); **Carl Joecks, Inc.**, 90 INA 406(Jan. 16, 1992).

Nevertheless, the Employer's appeal disingenuously contends that the Final Determination was in error, as it was seeking certification to hire a Management Trainee for the "corporation" and not for the restaurant, which the Alien would be supervising as one unit among many operated by Employer's franchise. The Employer's assertion of this issue is both late and inappropriate in view of its Application and its rebuttal representations, even though the DOT did recognize the category of Management Trainee at the time that it filed the Application.[7] The job duties described in the Employer's Application presented a managerial job that was consistent with the operation of a fast food franchise outlet. The CO reasonably construed this position as encompassing a fast food management trainee position, however. First, the CO accepted DOT Occupation Code No. 185.137-010 as the governing criterion, since the Employer made no reference to any other entity than "the restaurant" and spoke of replacing "other workers when they are absent." AF 16. Second, the CO's inference was reinforced by the Employer's rebuttal, which discussed the "internal policies regarding the experience level of managers or any other employees of the store" before saying, (1) "There are several reasons why the employer is requiring that the Manager of its restaurant must have 2 years of experience in that job or in a related occupation" and (2) "Basically, the Manager must be completely capable of running and operating the business and must be able to do so without the assistance or oversight of a superior." This was further reinforced by the Employer's "Manager Schedule," which included the Alien and five other persons whom it presented as managers of a Burger King "store" or restaurant. AF 07, 08, 10. Consequently, the CO's Final Determination considered only the SVP under DOT Occupation Code No. 185.137-010 for a Fast Food Services Manager.

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[7] 189.167-018 **MANAGEMENT TRAINEE** (any industry) Performs assigned duties, under direction of experienced personnel, to gain knowledge and experience required for promotion to management positions: Receives training and performs duties in several departments, such as credit, customer relations, accounting, or sales, to become familiar with line and staff functions, operations, management viewpoints, and company policies and practices that affect each phase of business. Observes experienced workers to acquire knowledge of methods, procedures, and standards required for performance of departmental duties. Workers are usually trained in functions and operations of related departments to facilitate subsequent transferability between departments and to provide greater promotional opportunities. May be required to attend company-sponsored training classes. *GOE: 11.05.02 STRENGTH: L GED: R5 M3 L4 SVP: 6 DLU: 87*

20 CFR § 656.26(b)(4) provides that "[t]he request for review, statements, briefs, and other submissions [to BALCA] shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." In this case the Employer's appeal first argued that the CO should have considered this as a position for a Management Trainee (any industry) under DOT No. 189.167-018. It is well established that where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. **Huron Aviation**, 88 INA 431 (Jul. 27, 1989). As this argument relied on evidence that was not in the Appellate File, the Panel notes that the Board may not consider arguments presented after the Final Decision which encompass material facts not in the record before the CO. See **Modular Container Systems, Inc.**, *supra*; and **Yaron Development Co.**, *supra*; also note **Cynthia Bartky**, 90 INA 440 (May 9, 1991). Consequently, the contentions as to the classification of the Job Offered that first appeared in the Employer's appellate brief are rejected.

As the Panel has concluded that Appellate File supported the CO's denial of alien labor certification on grounds that the Employer's work experience job requirement was unduly restrictive, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 081
BURGERS OF COLUMBIA PIKE, INC., Employer,
ANWER SAEED, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: May 25, 1999